INDEX.

Subject Index.

	Page
Statement of case	1
Assigned errors intended to be urged	9
Argument	10
I. Plaintiff not entitled to benefits of Federal act	10
II. Evidence insufficient for finding defendant negligent	27
III. Assumption of risk established as a matter of law	38

Table of Cases.

American Security Co. vs. District of Columbia, 224 U. S., 491	26
Aerkfetz vs. Humphreys, 145 U. S., 418	30, 32, 35, 40
American Surety Co. vs. Pauly, 170 U. S., 133	14
Anson, Contracts, 3d American Edition, page 207	18
Arkansas Smelting Co. vs. Belden Co., 127 U. S., 379, 387	18
Carlo vs. B. & L. E. R. Co., 143 Atl., 5	33
C. & A. Ry. Co. vs. Wagner, 239 U. S., 452	17
C., M. & St. P. Ry. vs. Coogan, 271 U. S., 472	27
C., B. & Q. R. Co. vs. Hammond, 210 Ill., 187	14
Cundy vs. Lindsay, 3 Appeal Cases, 459	18
39 Corpus Juris, 721	41
13 Corpus Juris, 378	17
Davis, Agent, vs. Kennedy, 266 U. S., 147	22
Fletcher, Corporations, Vol. IV, page 3457	14
G. N. Ry. Co. vs. Wiles, 240 U. S., 444	22
Holy Trinity Church vs. U. S., 143 U. S., 457	25
Horner vs. Graves, 7 Bing., 735	22
Hull vs. P. & R. Ry. Co., 252 U. S., 475	20
I. C. Ry. Co. vs. Hart, 176 Fed., 245	34
I. C. Ry. Co. vs. Skaggs, 240 U. S., 66	22
National Life Insurance Co. vs. Minch, 53 N. Y., 144	14
N. & W. Ry. Co. vs. Bondurant, 107 Va., 515	20
N. & W. Ry. Co. vs. Gesswine, 144 Fed., 56	33
Payne vs. Daugherty, 283 Fed., 353	61
P., B. & W. R. Co. vs. Schubert, 224 U. S., 603	17
Rodliff vs. Dallinger, 141 Mass., 1	17
Robinson vs. B. & O. R. R. Co., 237 U. S., 84	20

	Page
10 Ruling Case Law, p. 1005	28
20 Ruling Case Law, p. 47	33
Second Employers' Liability Case, 223 U. S., 1	24
S. & I. Ry. Co. vs. Campbell, 241 U. S., 497	17
Stafford vs. B. & O. Ry. Co., 262 Fed., 807	21
Toledo, St. Louis & Western R. Co. vs. Allen, 276 U. S., 165	31, 35, 38, 42, 43
U. V. Ry. Co. vs. Cahline, 49 S. C. R., 91	22
Yazoo & M. V. R. Co. vs. Kern, 90 Ark., 584	13

OFFICIAL REPORT OF OPINIONS BELOW.

Opinion of Appellate Court of Illinois	247 Ill. App., 600
Order of Supreme Court of Illinois	Not reported, but appears in full in the record. (R., 291.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT

ON CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PETITIONER.

Statement of Case.

This case is here on certiorari to review a judgment of the Appellate Court (on which certiorari was refused by the Supreme Court of Illinois), affirming a judgment of the Circuit Court of Cook County, for

$15,000 in favor of respondent (hereafter called plaintiff) and against petitioner (hereafter called defendant) in a suit under the Federal Employers Liability Act (35 Stat. 65) for injuries sustained by ~~defendant~~, a switchman, in the course of interstate commerce, in defendant's switching yard at Kolze, Illinois.

The questions on which this Court is asked to pass are: first, whether an impostor is entitled to the benefits of the Federal Employers' Liability Act; second, whether evidence of defendant's negligence was sufficient as a matter of law; third, whether plaintiff's assumption of risk was established as a matter of law.

Plaintiff was a man whom defendant refused knowingly to employ in train service on account of physical defects disqualifying him for that occupation. On October 1, 1923, he applied, under his true name of Joe Rock to defendant's yardmaster at Kolze, Illinois, for work as a switchman in that yard. (R. 16, 17, 53.)

The yardmaster does not hire employes, but merely sends applicants to the superintendent's office. (R. 91.) He sent plaintiff to the superintendent's office. (R. 55.) The latter, in connection with the company doctor, is the employing officer. (R. 162.)

The superintendent followed the regular practice in dealing with plaintiff's application. (R. 163.) This consisted in having the candidate fill out an application stating his previous record, giving him a slight oral examination, and if he looked all right, sending him to a company doctor for physical examination. If passed by the company doctor, the candidate would be put on the roster. (R. 162.) If unable to pass, he

would be rejected by the company doctor. (R. 57.) This, without any further appearance before, or communication with, the superintendent, would entitle the applicant to go to work. One of defendant's standing general rules requires that employes pass the required examinations. (R. 182.)

When plaintiff was sent by the superintendent to the company doctors for physical examination they found that he had previously been operated on for an abscess, or ulcer, of the stomach and for appendicitis and that he then had a rupture or hernia. (R. 17, 43, 57.) Plaintiff was then and there informed by one of the doctors that he was rejected on account of his physical defects. (R. 43, 57.)

Plaintiff later procured the desired employment by practicing the following fraudulent imposture and false impersonation. On October 18, 1923, he again applied to the yardmaster at Kolze for a position, this time under the alias of John Rock. (R. 17.) He thus procured himself to be sent a second time to the superintendent's office. (R. 55.) There he was asked if he had not been there before. (R. 56.) He replied "My brother was here." (R. 56.) Having thus allayed suspicion, and being sent again to the company doctor's office for examination, he took another man named Lenhart to the doctor's office, to pass the physical examination in the name of John Rock. (R. 18, 56, 57.) Plaintiff remained outside in the waiting room while Lenhart went to the doctor's, said "I am John J. Rock," and successfully passed the examination. (R. 57, 58.) The name John J. Rock was thereupon put

on the roster of employes, and plaintiff went to work as a switchman's helper in defendant's yard at Kolze. (R. 18, 19, 56.)

While it is far from clear, it is possible, that plaintiff meant to claim in his testimony, in which he spoke of giving some cigars to the yardmaster, that the latter recalled plaintiff's previous application and rejection when plaintiff made his second application and was put to work. (R. 55.) This the yardmaster denied. (R. 84.) With this possible exception of the yardmaster, who had no authority to represent defendant in the matter of employment, there is no suggestion that any representative of defendant had any knowledge of plaintiff's imposture until after the accident for which this suit was brought.

The accident occurred after plaintiff had been working for defendant approximately fourteen months, at about 9:00 o'clock in the evening of December 31, 1924. (R. 18, 20, 21.) The Kolze yard where plaintiff worked runs north and south, and the southern end, where the accident happened, is shown in a map opposite (R. 78.). Plaintiff had been switching and making up trains in the north end of the yard, and came with his crew to the south end at about 8:30 or 9:00 o'clock in the evening. (R. 21.) He left his engine on the easternmost tracks, east of the depot. (R. 21.) His work involved interstate commerce. (R. 21.) The crew then had twenty minutes for their supper. (R. 22.) The others ate in the depot nearby, or in the engine. (R. 22.)

Plaintiff went to his mother-in-law's for supper. (R. 22.) This was across the tracks on the west, or oppo-

site, side from where he left his engine, about 300 feet distant from the tracks. (R. 22.) He was at his mother-in-law's house between ten and fifteen minutes. (R. 22.) On his way back to his engine, after supper, he stopped at the oil house on the west side of the tracks, before crossing them, to fill his lantern. (R. 22, 23.)

Plaintiff then had to cross five or six tracks to get back to his engine. He crossed the first, or ice-house track, without adventure. (R. 23.) He then saw on the next track—the new yard lead track—a long train approaching from the south at a rate of about three miles per hour. (R. 23, 24, 31.) Plaintiff testified that it had a bright headlight. (R. 23.) He crossed the track in front of this train. (R. 24.) At first he testified that he was walking slowly. (R. 37.) Later, he admitted that he was in a hurry to get back to his job, afraid he would be late, and that he was walking fast, going faster than the engine. (R. 40, 41.) He was running, according to the testimony of a brakeman riding on the front of the engine, who saw him plainly until he was struck and run over on the next track. (R. 241.)

Plaintiff testified that the next track was about fifteen feet distant from the one he had just crossed. (R. 24.) The original map which was put in evidence as defendant's Exhibit #1 (shown on a reduced scale opposite R. 78) and which was based on an actual survey proves that the distance between these two tracks, center to center, was nineteen feet. (R. 77.)

Asked what happened next plaintiff answered: "Well, I kept right on going. And the next thing I

knew, why, I seen a caboose • • • coming down the old lead (the next track) • • • come out from under that bright headlight • • • moving north. • • • I tried to get out of its way • • • it struck me and knocked me down." (R. 24, 25.)

The engine which was pushing these cabooses was a switch engine. (R. 120.) The engineer, the switch foreman or conductor, and plaintiff himself, who had previously worked on this movement, described it. It consisted in getting two cabooses which were stored on a track on the east side of the depot, hauling them south across Irving Park Boulevard, then backing them north over that boulevard along the track on the west side of the yard on which they were moving when plaintiff was injured, and from there "kicking" them in "to be used on the freights." (R. 35, 121, 123, 206, 207.)

The last stop of the cabooses previous to the movement in which plaintiff was injured was made with the head caboose at No. 1 switch, headed north. (R. 131.) See map. (R. 78.) The conductor in charge of the movement then went ahead to throw the next switch—No. 2—and stood there. (R. 207.) He was then about seventy-five feet ahead—north—of the head caboose. (R. 207.) Thus he had a clear view of the track along which it was to be kicked towards him. He then gave the signal to cut the cabooses off and kick them ahead. (R. 208.)

The engineer then started up, and had advanced about fifteen feet, and was just about to increase his speed preparatory to the kick—going about six miles

per hour—when the conductor who was still standing at No. 2 switch saw plaintiff dart across in front of the engine of the Belt Line train towards the tracks on which the cabooses were being shoved. The Belt Line train was approaching on a parallel track in the same direction as the cabooses were coming. (R. 124, 208, 210.)

The conductor gave a violent signal to stop the caboose movement; the switchman who was to cut off the cabooses refrained from doing so; the engineer applied the emergency brake and "put the sand on"; and he stopped within thirty or thirty-five feet after striking plaintiff. (R. 124, 210, 215.)

Negligence was asserted against defendant, in the complaint or declaration, on the alleged ground that it operated the Belt Line engine (by which plaintiff testified that he was blinded when he looked in the direction of the approaching cabooses) within yard limits without dimming its headlight. (R. 4, 6, 7.) The only evidence which in any way tended to support this charge was that of plaintiff, who merely asserted that the headlight was "bright"; that it "blinded" him; and that a dimmed headlight would not blind the vision. (R. 23, 31.) He did not directly assert that the headlight was not dimmed. Of the nine witnesses who were actually at or near the scene of the accident and testified for defendant, seven, including the engineer who had dimmed it, on reaching the yard limits, directly testified that the headlight was dimmed, and two that they had not noticed. (R. 111, 124, 142, 168, 185, 197, 207, 227, 238.)

It is admitted that no whistle or bell or other audible signal was sounded to warn of the caboose movement; but there was no evidence that such was customary or required.

Alleged negligence of defendant was also based on the admitted fact that there was no lookout man or warning light on the caboose which ran over plaintiff. As noted above, it was being pushed about in the switching yard. (R. 206, 208.) When cars are being pushed by an engine, defendant's rules require a flagman to be in a conspicuous position, and a white light to be displayed at night on the front of the leading car—"except when shifting or making up trains in yards". (R. 182.)

To offset this, an attempt was made to prove a custom to have a man with a light on the foremost car in performing this particular movement. Plaintiff produced one witness who testified that he had never seen the movement performed otherwise. (R. 71.) The testimony of all the other witnesses was to the effect that this was only done when an immediate coupling was to be made; that otherwise the lookout would be there while passing over the public street or Irving Park Boulevard, after which he would drop off, before reaching the point where this accident occurred. (R. 65, 124, 210.) There was no testimony that a man would remain on the head caboose with a light for the purpose of warning yard employes of the movement. Plaintiff himself negatived the alleged custom by testifying that he had worked on this very movement many times and that "once in a while" they had such a light

and "once in a while" not. (R. 36.) Also that he knew that cabooses might be backing up on this track without a light. (R. 36.)

There was some attempt, in behalf of plaintiff, to establish that there was a well defined path across the tracks at the place where he was injured. No evidence was elicited to establish such a path. It was shown, however, that yard men frequently crossed the track back and forth in this general vicinity.

Assigned Errors Intended to be Urged.

In the Circuit Court defendant filed a plea denying the relationship of employer and employe between it and plaintiff (R. 9); requested an instruction to the jury in which the same point was involved, which was refused (R. 264); moved for a directed verdict in its favor at the close of plaintiff's case and again at the close of all the evidence, which motions were denied (R. 72-77, 255), and moved for a new trial and in arrest of judgment, which motions were refused. (R. 264-265.) Defendant appealed to the Appellate Court, which affirmed the judgment of the Court below, and in its written opinion (R. 275-276) recognized that defendant had duly saved the grounds of error hereinafter urged, namely:

1. That plaintiff was not entitled to the benefits of the Federal Employers' Liability Act.

2. That the evidence was not sufficient for finding defendant negligent.

3. That plaintiff's assumption of risk was established as a matter of law.

Error in Holding Plaintiff Entitled to the Benefit of the Federal Employers' Liability Act.

Plaintiff was an impostor who slipped into defendant's train service operations by false impersonation. He had applied to defendant for such employment in his true personality and under his true name, Joe Rock; had attempted to pass the requisite physical examination; and had been rejected because of previous stomach ulcers or abscess, an operation for appendicitis, and hernia or rupture then existing. (R. 17, 43, 57.) These physical defects disqualified him according to defendant's established rules for such service, and he was so advised by the examining physician. (R. 43, 57.)

Later, he secured such employment by assuming a false personality. He gave the superintendent, who was the employing officer, a different name than he had given the first time, John J. Rock. When the superintendent asked if he had not been there before he replied, "My brother was here". (R. 56.) Thus he falsely represented himself as not being the same person who had applied before and been rejected. Then he procured another man to go to the company doctor's office, say "I am John J. Rock," and successfully pass the physical examination. (R. 57, 58.) Plaintiff assumed to himself the physical personality of this other man in going to work under the certificate of fitness thus procured and issued. (R. 18, 19, 56.)

In this way plaintiff fraudulently brought about a complete mistake on the part of defendant's superintendent and physician, who were its only authorized representatives in the matter of this employment, as to those aspects of his personality which were material to the defendant in connection with such employment; and defendant had no intention whatever of contracting with him for his employment in his true personality.

Of course, when plaintiff worked for defendant he became its employe in a *de facto* sense. But it is our contention that because of the fraudulent imposture and false impersonation by which he secured such employment he never was our employe *de jure*. Hence we contend that his rights are only such as he may have at common law; and that he is not entitled to the special benefits of the Federal Employers' Liability Act, on which this suit was based.

The Appellate Court's opinion erroneously stated that defendant admitted "that plaintiff was an employe under the provisions of the Federal Employers' Liability Act". (R. 275.)

Defendant had filed a plea specifically denying the relationship of employer and employe (R. 9); requested an instruction to the jury in which the same point was involved, which was refused (R. 264); moved for a new trial, after verdict, which was refused (R. 265), and assigned error in the Appellate Court in which the point was saved. (R. 269.) Indeed, the Appellate Court itself, later in its opinion, considered the point as being before it, saying that defendant contended that,

> "The fraud perpetrated upon the defendant by the plaintiff in his attempt to secure employment deprived him of the right to claim the benefits accruing to employes under the provisions of the Federal Employers' Act." (R. 278.)

The Appellate Court held that the misnomer of plaintiff in his declaration or complaint was not available to defendant for lack of a plea in abatement, and was without merit. With that ruling we have no quarrel. It is of no real importance to us under what name plaintiff brought his action. Nor would the mere fact that he gave a false name in seeking employment be vitally important in and of itself. It is only material to us in so far as the false name of John J. Rock was used as a means of divorcing himself, in the employing officers' minds, from the Joe Rock who had previously applied, and whom they were unwilling to employ on account of physical disability. That is the real significance, as we see it, of the change of names.

The Appellate Court declared, as if it eliminated defendant's right to insist on its mistake as to plaintiff's personality, that,

> "The testimony of the plaintiff is to the effect that when he made the second application the yardmaster knew that he was the same person who had been rejected under the first application." (R. 276.)

The yardmaster had no authority to hire men. (R. 91.) He was merely the man by whom plaintiff was sent to the superintendent, who was the employing

officer. (R. 91, 162.) His testimony denied any recollection of a previous application and rejection of plaintiff. (R. 84.) Indeed, plaintiff's own testimony on the point (R. 55) is far from clear, as indicated by the fact that his counsel in his reply brief opposing the issuance of certiorari in this Court merely stated that "it may reasonably be inferred" from plaintiff's testimony that defendant's yardmaster had such recollection and knowledge. (Reply 4.) But even if we indulge that doubtful inference, as did the Appellate Court, it does not dispose of the defendant's right to rely on its fraudulently procured mistake as to plaintiff's personality.

For, as we have seen, the yardmaster was not the employing officer. As was said in Yazoo & M. V. R. Co. *vs.* Kern, 99 Ark. 584, 138 S. W., 988, 989:

> "The position of yardmaster with respect to the employment of men under his control is the same as that of conductor of a train. His crew is made up for him by another who is superior in authority and who employs the men to work under him. * * *
>
> "The company had the right to determine, through its officers, what persons should be taken into its service and what particular agent should be clothed with authority to enter into contracts for service to be performed."

Being without authority in the matter of employment, knowledge of the yardmaster uncommunicated to those representatives of the defendant who were authorized to make the contract of employment, would not bind the defendant, without proof that it was

within the scope of his duty to impart the information to the corporation. Fletcher Cyc. of Corporations, Vol. IV, page 3457; C., B. & Q. R. R. Co. *vs.* Hammond, 210 Ill. 187, 71 N. E. 576. There was no such proof in the record.

Moreover, if the suggested inference is to be drawn from plaintiff's testimony, then it plainly shows collusion with plaintiff by the yardmaster against defendant's interests, in sending plaintiff to the superintendent a second time for employment, knowing that he had been rejected as ineligible. Such collusion would, on the plainest principles of justice, prevent defendant from being bound by the yardmaster's knowledge. As this Court stated in American Surety Co. *vs.* Pauly, 170 U. S. 133, 156:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal."

Or, as stated by the New York Court of Appeals in National Life Insurance Co. *vs.* Minch, 53 N. Y. 144, 150:

> "If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third

> persons, and not those who use the agent to further their own frauds upon the principal."

The Appellate Court also pointed out, as if it tended to dispose of the contention that plaintiff was not an employe within the meaning of the Federal Employers' Liability Act, that:

> "The physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury." (R. 278.)

This point has also been repeatedly emphasized by counsel for plaintiff. We are utterly unable to see that it has any bearing whatever on this question. Plaintiff attempts to secure the benefits of the Act on the theory that he is an employe within its meaning. We contend that he is not such an employe because of the mistake which he fraudulently procured as to his personality. The question turns entirely upon the fraudulent manner in which he procured his employment. If we are right he never became our employe in a proper sense regardless of what was the cause of his injury. Indeed, the validity of our contention in this regard would be the same if he had never received any injury whatsoever.

The Appellate Court also indicated in its opinion that it felt constrained to rule against us on this point by the authority of previous decisions which were cited in the opinion. (R. 280-282.) These were cases in which men seeking employment misrepresented their age or physical condition. This, according to the decisions, rendered the contract of employment merely

voidable upon the discovery of the fraud, and not absolutely void *ab initio*. A distinction which we emphasize is that in all these cases the employe presented himself throughout in his proper person, and there was no false impersonation of another individual resulting on the part of the employer in a mistake as to the personality of the man employed.

Moreover, only one of these cases was a decision by a Federal court, Payne *vs.* Daugherty, 283 Fed. 353, decided by the Circuit Court of Appeals, Eighth Circuit, in October, 1922. Further, that was the most extreme of the cases cited, so that in dealing with it we will at the same time be dealing with the other cases cited. There a switchman was injured, as alleged, through a defective handhold in the ladder of a car moving in interstate commerce. When he brought suit against the Director General, the latter offered to prove that plaintiff obtained his position by fraudulently misrepresenting his former employment and concealing prior injuries, and that he was a victim of epilepsy. It appeared that he had signed a written statement, when seeking employment, which in effect concealed the above matters; but it did not appear that he had assumed a false personality. (283 Fed. 358.)

In that case the Court of Appeals sustained the trial Court's exclusion of the offered evidence on the ground that it should not permit

> "a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty required by law for the safety of the latter (plaintiff). * * * In our

> opinion we should hold that the defense urged was not available in view of the positive terms of Sections 1 and 5 of the former Act."

Immediately following the statement last quoted above the Court of Appeals cited three decisions of this Court: P. B. & W. R. R. Co. *vs.* Schubert, 224 U. S. 603; C. & A. Ry. Co. *vs.* Wagner, 239 U. S. 452; S. & I. Ry. Co. *vs.* Campbell, 241 U. S. 497. We have examined these cases, and do not find that they involve the ruling in support of which they are cited. The decision of the Court of Appeals in that case did not reach this Court, and its soundness appears to us questionable on grounds of public policy hereinafter mentioned. However that may be, that case merely involved fraudulent misrepresentations, without any false substitution of another personality, whereas our case presents such a substitution resulting in a mistake as to the essential identity of one of the contracting parties, which, unlike mere fraud which renders a contract only voidable, is recognized as rendering it absolutely void *ab initio*.

The rule is thus stated at 13 *C. J.* 378:

> "There is no agreement where one party enters into the contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another."

Again, the Supreme Court of Massachusetts, per Holmes, J., in Rodliff *vs.* Dallinger, 141 Mass. 1, where one of the contracting parties, through fraud of the

other, supposed he was dealing with someone else, held:

> "There is no question of rescission—the transaction is void *ab initio*—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistake."

Lord Cairnes applied this principle in Cundy *vs.* Lindsay, 3 App. Cases, 459 saying:

> "With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever."

Again this Court said in Ark. Smelting Co. *vs.* Belden Co., 127 U. S. 379, 387:

> "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

Sir William Anson, in his highly regarded work on contracts, Third American Edition, states at page 207:

> "If a man accepts an offer which is plainly meant for another, or if he becomes party to a contract *by falsely representing himself to be another*, the contract in either case is void, or to put it more accurately, no contract ever comes into existence." (Italics ours.)

Plaintiff "falsely represented himself to be another," namely, the substitute whom he procured to

take the physical examination in his behalf. True, he appeared in his proper person before the superintendent. But he appeared under a false personality before the doctor, or caused another person to be represented as himself, which comes to the same thing. The doctor, who performed a function in the employment no less important than that of the superintendent, never intended to certify the plaintiff, but the other person who appeared before him. As for the superintendent, he intended to employ the person who appeared before the doctor. He had no idea whatever of contracting with the person who had been rejected for physical defects, namely, this plaintiff. Hence, we say, no contract was consummated.

Was the impostor entitled to the benefit of the Federal Employers' Liability Act in the above circumstances?

That Act provides that a common carrier by railroad engaged in interstate commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. (35 Stat. 65.)

It proceeds, in derogation of the common law, to confer special advantages on its beneficiaries, by eliminating contributory negligence as a defense in bar in all cases under the Act; by eliminating contributory negligence and assumption of risk even in mitigation of damages in all safety appliance cases; and by allowing defendant to be sued in Federal Court in any jurisdiction where it can be found.

In declaring what employes are entitled to the special benefits of this Act, this Court said in Robinson *vs.* B. & O. R. R., 237 U. S. 84, 94, and again in Hull *vs.* P. & R. Ry. Co., 252 U. S. 475, 479:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the *conventional* relation of employer and employe." (Italics ours.)

"Conventional" may mean either *customary* or *contractual*. Surely, it cannot be said that fraudulent imposture by an employe upon an employer is the *customary* relationship. Nor, as we have just seen, can it be said that a *contractual* relationship existed in the present case, because of the mistake as to his personality fraudulently procured by the plaintiff. It seems to us perfectly clear that if the existence of a contract of employment—which is the normal and natural relationship between employer and employe—is essential to the right of the employe to have the special advantages of this Act, then this plaintiff does not come within its terms.

The precise question is one of first impression, for we have been unable to find any decision directly in point, and those relied on by the Appellate Court and plaintiff's counsel are distinguishable, as we have shown above.

It was stated by the Court in N. & W. Ry. Co. *vs.* Bondurant, 107 Va. 515, that

> "It would be a hard measure of justice to hold a company responsible on the one hand for fail-

> ure to prescribe rules and on the other to refuse to protect from the consequences of the violation of reasonable and proper rules adopted and promulgated in the discharge of the duty imposed by law."

The closest case on its facts which we have found is Stafford *vs.* B. & O. Ry. Co., 262 Fed. 807 (D. C. N. D. W. Va.). Stafford secured employment as a brakeman, when he was over the prescribed age limit and unable to pass the required physical examination, by inducing another man to assume his name and pass the physical examination. Under the certificate of physical fitness thus issued in Stafford's name he secured his employment, and was injured while so employed. When he brought suit (whether under the Federal Employers' Liability Act does not appear) the above facts were presented in a special plea by defendant. In denying a motion to strike out this plea, District Judge Dayton said:

> "The question is one of first impression, that of a man over (not under) age, and charged to be physically incompetent under the rules of the Company, securing by the fraudulent impersonation of another a service of danger and responsibility, and, notwithstanding his fraud and deceit, seeking to hold the defrauded company responsible for an injury sustained by him in a place where he had no legal or other right to be. Had he not committed the fraud on the Company he would not have been injured. • • •
>
> "The force of the moral side of the question bears strongly, too, in the same direction. Railroad brakemen fill very responsible places in

> railroad operation. Not only the corporation, but the public also, are vitally interested in his physical and other ability to protect both lives and property from destruction."

The Judge accordingly overruled the motion to reject the plea. After filing of the above opinion the case was dismissed on motion of plaintiff, at his costs. It will be observed that the Judge did not discuss the legal significance of the fraudulently procured mistake as to plaintiff's identity as rendering his supposed contract of employment a nullity; but he did give expression to the above very pertinent observations as to the public policy involved in discouraging such impostors.

The general principle was stated by Tindal, C. J., in Horner *vs.* Graves, 7 Bing. 735, 743:

> "Whatever is injurious to the interests of the public is void, on the grounds of public policy."

This Court, too, has not hesitated to consider public policy in determining who are entitled to the benefits of the Federal Employers' Liability Act, particularly in the so-called "primary duty" cases, I. C. Ry. Co. *vs.* Skaggs, 240 U. S. 66; G. N. Ry. Co. *vs.* Wiles, 240 U. S. 444, 448; Davis, Agent, *vs.* Kennedy, 266 U. S., 147; U. V. Ry. Co. *vs.* Caldine, 49 S. C. R. 91.

G. N. Ry. Co. *vs.* Wiles, *supra*, illustrates our meaning. A recovery was there sought in behalf of a rear brakeman. His train was stopped by a pulled out drawbar. He failed to protect the rear of his train as required by the Company's rules. A rear end collision ensued, in which he was killed. This Court

construed the Act as not conferring its benefits on one who thus violated his primary duty to his employer, using this impressive language:

> "We cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them."

The principle that violation of a primary personal duty by an injured man resulting in an accident to him is a ground for excluding him from the scope of this Act seems to apply with full force to this case. Was it not the most primary of all plaintiff's duties to his employer to present himself in his proper person for the physical examination without which he knew that he was neither entitled to enter or remain in defendant's train service? And do not physical defectives who violate that duty, and secure employment in railroad train service through false impersonation of men of sound physique, in the language of the Wiles case, *supra*, cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them?

It is, of course, obvious that the effect of allowing this plaintiff the benefits of the Act would not be lim-

ited to his case, but would apply to all physical defectives who secure employment in railroad train service by procuring substitutes to pass their physical examinations. The color blind man who thus becomes an engineer and runs past an open switch, the person with a weak heart who thus slips into train service and suddenly collapses in a critical situation, the epileptic who has a fit in an emergency, in short all physical defectives who thus bring immeasurable peril to the lives of their fellow employes and the traveling public would be covered by this precedent, and others would be encouraged to follow their example. Such a result, we think, would be utterly abhorrent to public policy.

It is hardly conceivable that Congress had any such intention in enacting the Federal Employers' Liability Act. This Court pointed out in the Second Employers' Liability Cases, 223 U. S., 1, 48, that enhancing the *safety* and *security* of interstate commerce was a prime purpose of Congress in passing this legislation, and one of the reasons which brought it within the scope of Congressional authority. It said (italics ours):

> "If the *agents* or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or *unsafe* or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the Act of Commerce or make it less expeditious, less reliable, less economical and less *secure*. Therefore Congress may legislate about the agents and instruments of interstate commerce, etc."

Is the Court constrained to give this Act an interpretation which would directly tend to frustrate the safety and security of interstate commerce which it was intended to foster, by holding that its benefits extend to those employes who undermine such safety and security as did this plaintiff, merely because the Act described those entitled to its benefits by the general term "employes" without any express restriction or qualification?

This Court gave a negative answer to a similar question in Holy Trinity Church *vs.* U. S., 143 U. S., 457, 458, 462, 472. There the Court interpreted an Act of Congress which made it unlawful to assist the importation of any foreigner into the United States under an agreement to perform labor or service of any kind in the United States. Holy Trinity Church contracted with a certain Englishman to remove to the City of New York and enter its service as a rector and pastor, which he did. This action was brought to recover the penalty for violation of the statute. The lower court, recognizing that the case came within the literal prohibition of the statute, rendered judgment accordingly. This Court reversed the judgment declaring:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. • • • But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the Legislature intended to apply them. • • • Unexpectedly, it is

> developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute."

That decision was referred to with approval by this Court in American Security Company *vs.* District of Columbia, 224 U. S., 491, 495, as being:

> "A well known example of construing a statute not to include a case that indisputably was within the literal meaning, but was believed not to be within the aim of Congress."

We venture to suggest that, from the standpoint of effectuating public policy and the true intention of Congress, a qualification by the Court in this case of the seeming literal scope of the Act of Congress with the purpose of preventing it from encouraging a menace to that safety of interstate commerce which it was intended to promote, is no less important than was the similar qualification in the case of Holy Trinity Church, *supra*, with the object of preserving the free importation of foreign clergymen.

We submit that the Federal Employers Liability Act should not be interpreted as entitling this plaintiff to its benefits.

Error in Holding the Evidence Sufficient for Finding Defendant Negligent.

We rely on the rule that this Court will examine the evidence in cases under the Federal Employers' Liability Act, thus stated in C., M. & St. P. Ry. Co. *vs.* Coogan, 271 U. S. 472, 474:

> The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

We contend that the evidence of defendant's negligence was insufficient as a matter of law.

The declaration, or complaint, alleged negligence on account of defendant's asserted failure to dim the headlight of the engine by which plaintiff claimed he was blinded. The only evidence that the headlight was not dim consisted in plaintiff's testimony (1) that it was "bright" and (2) that it would not have blinded him if dimmed. (R. 23, 31.) The first was ambiguous, because even a dim headlight is obviously bright. The second was a mere conjecture. Hence his testimony, taken at its face value, was far from conclusive. Moreover, it was absolutely unsupported by any other evi-

dence. Seven witnesses called by defendant testified that it was dim, including the engineer who said he had dimmed the headlight when he reached the yard limits half a mile south of where the accident occurred; two testified that they had not noticed whether it was bright or dim. (R. 111, 124, 142, 168, 185, 197, 207, 227, 238.)

The true rule is thus stated in 10 Ruling Case Law, Evidence, Section 193, p. 1005:

> "In a conflict of evidence, mere number is not in itself controlling, but it certainly is entitled to great consideration, and should control unless there be special reason to credit the evidence of the smaller number."

The Appellate Court avoided passing on the question whether there was sufficient evidence for a finding that the light was not dim, and relied upon other matters, stating:

> "If it be assumed that the light was dimmed, still as we read the record, the plaintiff made out a clear *prima facie* case of negligence against the defendant." (R. 282.)

The Court later explained its position as follows:

> "It is clear from the evidence that (1) there was no ringing of the bell on the locomotive of the caboose train, nor was there any signal or warning given of the start or approach of this train (2) nor was there any lookout with a light on the foremost caboose. The plaintiff introduced evidence that it was the custom and practice when cars and cabooses were shoved at

> night over the lead track where this accident happened to have a man on the foremost car with a light • • • We are satisfied that the jury were warranted in finding that there was such a custom." (R. 283, 284.)

From which the Court concluded that the matter in which the caboose train was handled at night

> "showed such a disregard for the safety of the employes that might be using the crossway"

that the verdict against the defendant was justified. (R. 284.)

This conclusion appears wholly unwarranted upon an analysis of the stated points on which it was based and of the evidence pertinent to each.

(1) No ringing of the bell on the locomotive of the caboose train nor any signal or warning given of the start or approach of this train. This we admit; but deny that it constituted negligence. The Court omitted to point out that the accident occurred in a switch yard. This is alleged in each of the four counts of the declaration. (R. 2, 3, 5, 6.) Plaintiff himself so testified. (R. 34.) So did defendant's yardmaster. (R. 97.) It is apparent, too, from the map of the yard, and the testimony of the switchman who helped to pick plaintiff up after the accident at a point between Switch No. 1 and Switch No. 2, at the crossover, as shown on that map. (R. 78, 208.)

Counsel stated in his reply to our petition for certiorari in this Court that "the accident did not happen at a switch yard proper." (Reply 13.) An amusing

phase is that each count of the declaration alleged that it was in a switching yard, and this fact was relied on as requiring the headlight to be dimmed, but is repudiated in claiming that warning signals should have been given. The claim that it was not in a switching yard proper is diametrically opposed to the facts. The only justification counsel offered was to the effect that *more* switching operations were conducted in the other end of the yard than at this end. The witness he cites testifies that at this end of the yard trains were not "made up," but cars were "kicked" or "shoved" on to the lead tracks. (R. 71.)

The movement of the cabooses which struck and injured plaintiff was plainly a switching movement—getting the cabooses from the caboose storage track on the east side of the depot, hauling them south across Irving Park Boulevard, then backing them north over that boulevard along the track on the west side of the yard on which they were moving when plaintiff was injured, and from there "kicking" them in "to be used on the freights." Plaintiff himself, who had previously worked on this movement, so described it (R. 35); also the switch foreman (R. 206, 207); also the engineer. (R. 121, 123.) The engine used was a switch engine. (R. 120.) Beyond question, this was a switching movement in a switching yard.

Was it negligence to perform such a movement, in such a yard, without a warning bell or other warning signal? This Court has answered that question. It said in Aerkfetz *vs.* Humphreys, 145 U. S. 418, 420, with reference to switching movements in railroad yards:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

This Court quoted the above from the Aerkfetz case with approval, quite recently, in a case under the Federal Employers' Liability Act, Toledo, St. Louis & Western Ry. Co. *vs.* Allen, 276 U. S. 165, 171, and declared in speaking of an employe injured in a yard switching movement:

> "On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car."

In the present case there was no evidence of any custom to give warning bells, or other audible signals, to warn employes of such movements.

(2) Absence of a lookout man with a light on the foremost caboose which injured plaintiff. We concede the fact; but deny that it constituted negligence in a switching movement, in a switching yard. In the

Aerkfetz case, *supra*, where a track repairer was injured while he was actually working on the track in a switch yard, by a freight car pushed by a switch engine, this Court held:

> "It cannot be said that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected." (145 U. S. 418, 420.)

True the Court pointed out before making that statement that the engine was moving slowly; so too in the present case the speed of the engine and attached cabooses at the time plaintiff was struck by the latter was about five miles per hour. (R. 134, 137, 210.)

As if to counteract the above principle, the Appellate Court held, as noted above, that there was evidence from which the jury might find the existence of a *custom* to have a lookout man with a lantern on the foremost car in this particular switching movement. The only direct testimony to that effect was given by a switchman who had worked on this movement. Testifying for plaintiff, he asserted that he never saw it performed without a man with a lantern on the leading car. (R. 71.) But neither that witness, nor any other witness, testified that the man with the lantern would be there for the purpose of warning yard employes out of the way of the movement. Of course, mere failure to comply with a custom not intended to protect him or to comply with any legal duty owed to him, would not constitute negligence as to him. N. &

W. Ry. Co. vs. Gesswine, 144 Fed. 56, 60 (C. C. A. 6th Circuit); 20 Ruling Case Law, page 47.

Plaintiff's other witness on this point testified to the effect that there would be a man on the leading car when there was an intention to make a coupling, and for that purpose. (R. 65.) Testimony of all the other witnesses on this point, including the conductor in charge of the movement and his engineer, was to the effect that it was only while Irving Park Boulevard was being crossed, or a coupling was to be made (neither of which was true when plaintiff was injured) that a man would ride the leading car; otherwise not. (R. 124, 210.) In Carlo *vs.* B. & L. E. R. Co., 143 Atl. 5, 6, 7, a case under the Federal Employers' Liability Act, the Supreme Court of Pennsylvania dealt with the testimony of a brakeman injured in a yard when a train was backed, that it was the custom to sound the whistle in such movements. The Court said:

> "At best, it would be a local custom, pertaining to this particular yard, and, as it would conflict with the ordinary rule or duty as to yards, it must be shown to be actually known to all of the employes who dealt with it."

Assuming, nevertheless, that the alleged custom might be found to have existed as to the movement in which plaintiff was injured, the Appellate Court was nevertheless apparently in error in supposing that its breach in the instant case would in and of itself justify a recovery against defendant. There was absolutely no evidence that any such custom was known to any

responsible officer of the defendant. Its yardmaster and superintendent both testified that the alleged practice was not followed, except in crossing Irving Park Boulevard, or where a coupling was to be made. (R. 83, 164.)

In Illinois Central Ry. Co. *vs.* Hart, 176 Fed. 245, 250, the U. S. Court of Appeals for the Sixth Circuit pointed out that there was no evidence that the custom there relied on was known to the defendant railway company and said:

> "We need not go outside the decisions of this court for authority that such notice is necessary in order to bind the defendant."

Moreover, even if it had been the custom always to have a man with a light on the leading caboose in this movement, it is beyond dispute from plaintiff's own testimony that he did not know of it. His testimony was explicit, that he had worked on this very movement and "once in a while" they had a light on the leading car, "once in a while" not. (R. 35, 36.) Surely, one who does not claim that he knew and relied on an alleged customary practice which is not required by the usual standard of care, is not entitled to recover on account of its breach.

Negligence presupposes duty. The duty owed to an employe is the exercise of ordinary care to prevent his injury. Such duty, under the decisions of this Court, does not require the presence of a man with a lantern on the leading car in switching movements in a switching yard *for the purpose of warning employes who*

may be on or crossing the track. For a custom in and of itself to impose such a duty on a railway company, it must appear that the employe knew of the custom, relied on it, and was prejudiced by its non-observance; and that the railway company, in the exercise of ordinary care, should have anticipated such reliance and prejudice.

The Appellate Court also mentioned that there was a "crossway" over the yard tracks at the point where plaintiff was injured. The attempt to establish by evidence that this was a well-defined path had failed. It was, however, plain that employes were in the habit of crossing and recrossing the tracks frequently in about this same vicinity to get from one side to the other of the yard. Conceding full force to this fact, which is much emphasized in behalf of plaintiff, we cannot see that it has any significance as establishing a higher measure of care to be observed by defendant at this place than is ordinarily required in switch yards.

In the Aerkfetz case, *supra*, we saw that whistles and bells and lookout on leading cars being switched in a yard were not required even in the case of a track repairer who was in plain sight, on the track, his back to the approaching cars, absorbed in his work. So, too, in the case of a car checker who was likewise actually engaged in his work. Toledo, St. Louis & Western Ry. Co. *vs.* Allen, *supra*. It would seem absurd to hold that a yard employe, thoroughly familiar with yard movements, who is merely crossing the tracks with full opportunity to concentrate his attention ex-

clusively on protecting himself against those movements, is entitled to have a higher degree of caution exercised in protecting him against the consequences of his own reckless inattention, than men actually absorbed in their work.

Finally on the matter of negligence, it is extremely important to note that the caboose which struck plaintiff was not put in motion heedlessly, with no attention paid to whether or not there was a clear track ahead. The last stop was made with the cabooses at No. 1 switch, headed north. (R. 131.) See map. (R. 78.) The conductor then went to throw the next switch—No. 2—and stood there. (R. 207.) He was then about seventy-five feet head—north—of the caboose. (R. 207.) Thus he had a clear view of the track along which it was to be kicked towards him. He then gave the signal to cut the cabooses off and kick them ahead. (R. 208.)

The engineer then started up, and had advanced about fifteen feet from where he had stopped, and was just about to increase his speed preparatory to the kick—going about six miles per hour—when the conductor who was still standing at No. 2 switch saw plaintiff dart across in front of the engine of the Belt Line train (which was approaching on a parallel track) towards the track on which the cabooses were being shoved. (R. 124, 208, 210.)

The conductor gave a violent signal to stop the caboose movement; the switchman who was to cut the cabooses off did not do so; the engineer applied the emergency brake and "put the sand on"; and he stopped within thirty or thirty-five feet after striking plaintiff. (R. 124, 210, 215.)

All this affirmatively shows, not heedlessness, but alert watchfulness over the track on the part of the switching crew, in making the movement in which plaintiff was injured. What more could a man on the head end of the caboose, who would not have been in as good a position as the conductor to see plaintiff dart across in front of the Belt Line train from the other side of it, have done to frustrate plaintiff's recklessness by stopping the movement of the cabooses? How could it be negligence on the part of the defendant not to have such a man on the advancing caboose to keep watch over the movement when the conductor was there performing that very function?

As for the suggestion that a man on the head end of the caboose might have had a lantern, how can the absence of such a light be regarded as contributing in any degree to the accident, in view of plaintiff's explicit testimony that he was blinded by the headlight of the Belt Line train as he looked south in the direction from which the cabooses were coming, and could not see anything in that direction as he hurried onto the track on which they were approaching? (R. 24.) Regardless of whether the headlight was or was not dimmed, plaintiff alone knew whether he was blinded as he looked in the direction of the approaching cabooses so that he could see nothing in that quarter; his testimony to that effect was most explicit and positive, and must be accepted as a fact.

We submit that there is nothing in the record to justify the conclusion of the Appellate Court that the jury might properly find negligence on the part of the defendant which was a cause of this accident.

Error in Holding That Plaintiff's Assumption of Risk Was Not Established as a Matter of Law.

The Appellate Court did not discuss the evidence on this point, nor explain its conclusion, but recognized that the question was before it and declared:

> "It was a question of fact—not of law—whether the injury received by the plaintiff was occasioned by or through a peril of his employment, the risk which he had assumed. The jury by their verdict have found in favor of the plaintiff on this issue and we feel that we should not be justified in disturbing this finding."

We rely upon T. St. L. & W. R. R. Co. *vs.* Allen, *supra*, where, although the jury had found against defendant, this Court examined the record, and, finding that assumption of risk was established as a matter of law, reversed the judgment, indicating that it would follow that course in cases under this Act.

The well recognized general principle there stated, on which we rely, was:

> "The employe assumes the ordinary risks of his employment and, when obvious and fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employes."

The circumstances on which we rely for establishing assumption of risk as a matter of law are briefly these. The Appellate Court refrained from holding the evidence sufficient for a finding that the Belt Line

engine was operated with an undimmed headlight in the yard limits. This would seem to eliminate the necessity of dealing with the supposition that this headlight was undimmed. It may not be amiss, however, to point out that if it was not dimmed, that fact was perfectly obvious to plaintiff and in knowingly crossing through its rays he assumed the evident risk of being temporarily blinded as he looked in that direction, and of being in that condition before he crossed the next track, on which he knew that unlighted cabooses might be backing up from the direction of the headlight. (R. 36.)

Assuming that there was no justification for a finding that the headlight was not dimmed, still plaintiff's testimony is absolutely positive that he was blinded by its rays as he looked in that general direction which, whether the headlight was dimmed or not, must be taken as a fact, since he alone could testify on that point. He could not see the approaching caboose until it emerged from behind the headlight, when, as he testified, "I tried to get out of its way. It struck and knocked me down". (R. 25.)

This can only mean that plaintiff had not remained in a position of safety, as he could perfectly well have done, in the space of nineteen feet, center to center, between the track he had just crossed and the one on which the cabooses were coming, until his vision might improve, and he could see whether the track was clear. On the contrary, knowing that cabooses might be approaching on the track, in his own words he "kept right on going", unable to see a thing in that direction,

until he was in a position where he could not avoid being knocked down by the caboose. (R. 24, 25.) This risk was perfectly obvious, and known to plaintiff, and he plainly assumed it in hurrying on, instead of stopping until he could see what, if anything, was coming on the track.

At this point it seems pertinent to briefly recapitulate all the grounds which the Appellate Court considered for the establishment of defendant's negligence. Alleged maintenance of an undimmed headlight on the Belt Line train was not found by the Court to be established, as noted above. Failure to sound a warning whistle or bell, or give other audible signal of the approach of the cabooses, was emphasized by the Court; but, in the complete absence of any testimony that such signals were customary, could not constitute negligence in a yard switching movement, under the rule in the Aerkfetz case, *supra*. The implication in the Appellate Court's opinion that the cabooses were moved without regard to whether or not the track was clear was completely rebutted by the evidence, which the Court did not mention, that the conductor in charge of the movement was in a perfect position to see that the track was clear.

The only remaining point mentioned by the Appellate Court was the admitted absence of a lookout with a light on the foremost caboose, in connection with the Court's holding that there was sufficient evidence from which a custom to maintain such a lookout might be inferred. Assuming that there was adequate evidence on that point and that the lookout would be there for

the purpose of protecting employes who might be on the track (both of which suppositions we have previously negatived) still the plaintiff testified that he knew that such a practice was not always observed, and further that he knew, just before he was injured, that cabooses might be approaching without observing the alleged custom. Thus, any risk involved in the alleged negligence on which plaintiff's case finally rests was "obvious and fully known and appreciated by him," and the risk incident thereto was plainly assumed.

In his reply to our petition for certiorari in this Court, counsel for plaintiff attempted to put us in the position of insisting that plaintiff should not have crossed in front of the Belt Line train, when he had plenty of opportunity to do so in safety, but should have unnecessarily waited for this long slow moving train to pass when he was in a hurry to get back to work. Our chief contention is that, having crossed in front of this train, and become blinded by its headlight, he should have waited where he was in a position of safety until his vision cleared before crossing the next track, and not have gone on to it blindly when he knew that unlighted cabooses might be approaching.

Counsel also contends that we confuse contributory negligence with assumption of risk. We do not. Of course, assumption of risk may well involve an element of negligence; but there is in assumption of risk an element of knowledge of impending danger, which distinguishes it from mere negligence. 39 *Corpus Juris*, 721. To illustrate, if plaintiff had not known that cabooses might be approaching and had failed to

look up and down the track before crossing it, the omission of this precaution might have constituted nothing more than contributory negligence. It is his admitted knowledge of the yard and its operations and of the fact that the cabooses might be approaching that makes his going on to the track in front of them, when he knew he was in a blinded condition and could not see them, an assumption of the risk.

In this respect plaintiff's case is on all fours with the case of plaintiff in T., St. L. & W. R. R. Co. *vs.* Allen, *supra*. The plaintiff there, a car checker, was checking a string of cars, between two tracks, in a switch yard. He was struck by cars which were being kicked in at a speed of four to six miles per hour, which were unlighted and unattended and moved without warning. This Court, after pointing out that the members of the switching crew had a right to believe that plaintiff would keep out of the way of the shunted car, declared:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Plaintiff's counsel seemed to imply that it would be necessary for plaintiff to have positive knowledge that a caboose was actually bearing down upon him in order to charge him with assumption of risk in going on the track in front of it. But such explicit knowledge of the impending peril as to make it practically attempted

suicide to incur it, is not necessary to establish assumption of risk. It suffices, as held in T., St. L. & W. R. R. Co. *vs.* Allen, *supra*, that plaintiff knew, in the words of the Court, that cars "were *liable* to be shunted without warning to him" along the track where he was struck.

We respectfully submit that judgment against defendant should be reversed.

HENRY S. MITCHELL,
JOHN E. PALMER,
Counsel for Petitioner.

JOHN L. McINERNEY,
JAMES L. HETLAND,
Of Counsel.

February, 1929.